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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ANTHONY BELTRAN,

Defendant and Appellant.

E053541

(Super.Ct.No. FVA701548)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ingrid Adamson Uhler, Judge. Affirmed in part; reversed in part with directions.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Jennifer Jadovitz, and Garrett Beaumont, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, David Beltran, of first degree murder (Pen. Code, § 187, subd. (a))¹ and torture (§ 209), both of which were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(c)). In connection with the murder, the jury further found that a principal used a firearm, discharged a firearm and discharged a firearm causing death (§ 12022.53, subds. (b), (c), (d) & (e)(1)). Defendant was sentenced to prison for two consecutive terms of 25 years to life. He appeals claiming there is insufficient evidence to support the jury's finding that he committed these crimes to benefit a criminal street gang. We agree with him and, therefore, reverse the gang enhancement true findings and the firearm use enhancement true findings (which are dependent on the crimes being committed to benefit a street gang) and their sentences and instruct the trial court to amend the abstract of judgment and minutes of the sentencing hearing to reflect this. The parties agree that the trial court incorrectly calculated defendant's actual presentence time served, therefore, we will direct the trial court to award credit for 1,325 days and to reflect this in the minutes of the sentencing hearing and the abstract of judgment. Otherwise, we affirm.

FACTS

On April 4, 2003, defendant and his codefendant, both members and officers of a local chapter of the Vagos motorcycle club, participated, along with seven other members, in the beating of the victim, a club "hang-around," because the latter owed money to one of the other members and had not returned a truck belonging to yet another.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Then, defendant drove the bound victim, along with the codefendant, in his truck out to the desert where the victim was fatally shot. Because we reverse for insufficiency of the evidence only on the element of the gang enhancement that the Vagos had, as one or more of their primary activities, the commission of assault with a deadly weapon by means likely to produce great bodily injury, robbery, murder/manslaughter, the sale or possession for sale or transportation of controlled substances and/or the sale, delivery or transfer of firearms we will here set forth in detail only the evidence that might, and, according to the People does, support that finding.

The prosecution gang expert testified that in 2003, the Vagos had 45-50 local chapters, comprised of between three and in excess of 10 or 12 members, each, for a total of 300-400 members. Each chapter had its own officers and there was an international organization comprised of international level officers. He said that the presidents of the local chapters ran the chapters like governors run states and “at some point” the international organization “would be in charge of controlling the activities of all the local chapters.” However, he also said that the presidents of the local chapters decided how those chapters would operate, but they would have to answer to the international organization for what happened. Documents entitled “International/National Bylaws” seized in August 2010 were introduced at trial. The first stated “Revised and in Effect January 1, 2008.”² The other stated, “Revised and in Effect March, 1993[,]” but this was

² Curiously, it is this set of bylaws to which the People refer in their statement of facts as evidence of “the prevalence of criminal activities among” members in 2003.

crossed out and replaced with “Jan[uary] 2008[.]” The person who had possession of these documents testified that they were the bylaws for 2006 and 2008. He testified that they were changed year to year. He also said he did not know when the one that was originally marked “Revised and in Effect March, 1993” was in effect. In fact, he asserted that there were no bylaws in 2003, the years these crimes were committed. The prosecution’s gang expert testified that the international officers and the presidents of each local chapter had access to the bylaws. Aside from testifying, without identifying the source of his information, that members were able to retire early as provided for in the bylaws, he never once asserted that the bylaws actually governed the behavior of members in the local chapters.³ As to the former, he cited the bylaw’s provision that a member can retire early if imprisoned for a Vagos-related matter as an example of how crimes are committed for the benefit or at the direction of the club in that one gains respect within the organization for committing such crimes. He did not address other provisions of the bylaws that members coming out of prison can get leaves of absence from the club, that no prospect for membership can be touched, beaten or physically abused without an international officer being present and giving consent, that Vagos patches are to be protected with members’ lives, that patch holders (members in good standing) run the local chapters and believe there are only Vagos and everyone else and

³ We note, with interest, that the set marked, “Revised and in Effect January 1, 2008” states, “These Bylaws are only suggestions.”

that club business is not to be discussed outside the club. No other members who testified at trial were even asked about the bylaws.⁴

Four of the members who testified at trial expressed concern for the safety or well-being of themselves and their family members or fear of repercussions, but none specified what form this would take.⁵ According to one of them, members who disobeyed the rules or disrespected others in the club were disciplined with anything from “a little ass . . . kick[ing]” to a more substantial beating, but one that did not require medical attention.

According to the prosecution’s gang expert, patches some members wore signified that they either used to sell or use methamphetamine or marijuana or currently sold or used either drug. The expert also said that another patch was earned if a member knocked someone out with one punch. He never testified how many members wore these patches.

⁴ We discuss the bylaws and structure of the organization at this length only because the bylaws’ provisions about early retirement for members who go to prison for club-related crimes and automatic leaves of absence for members getting out of prison and the dearth in the bylaws of provisions addressing methamphetamine use along with the 2000-2002 twenty incidents of drug and/or firearm controlled sales provided the sole basis for the prosecutor’s argument to the jury concerning the primary activity of the group. For their part, the defendant and codefendant argued to the jury that they were not guilty of the charged offenses, therefore, neither even addressed the sufficiency of the evidence supporting the gang enhancement allegations.

⁵ The People assert, “Repercussions likely included murder, manslaughter, or aggravated assault committed by one or more Vagos members against either offending party or family members of the offending party.” The People fail to cite to the record for this assertion and there is nothing in their statement of facts related to it.

The gang expert testified that between 2000 and 2002, a member of the Nomad Chapter became an informant “within the Vagos” for the Bureau of Alcohol, Tobacco & Firearms and during this time he or another informant were able to buy either narcotics or firearms on 20 occasions.

Predicate offenses were identified as a 2000 killing that resulted in a second degree murder conviction of a San Bernardino chapter prospective member and a manslaughter conviction of a member, a 1998 assault that resulted in three Victorville chapter members being convicted of assault with intent to commit great bodily injury and a robbery conviction in 1997 by a Victor Valley chapter member.

A San Bernardino chapter member who testified at trial admitted suffering convictions in 1994, 1997, 1998, 2004 and 2008, for possession of controlled substances and a firearm. He said he used methamphetamine with the victim, who occasionally supplied it to him. Another member who also testified at trial admitted suffering convictions for transporting methamphetamine in 2004 and 2005 and discharging a firearm in 2004. Another member who testified said he used methamphetamine during the time of the murder and in 2005 was arrested for carrying a handgun.

A member testified that “some members” have drugs and guns when they travel together as a group.

ISSUES AND DISCUSSION

As already stated, according to the instructions given the jury, in order to conclude that the Vagos was a criminal street gang for purposes of the gang enhancements for both crimes and the firearm enhancements for murder, the jury had to find that the club has, as

one of more of its primary activities, the commission of “assault with a deadly weapon or by means likely to produce great bodily injury, robbery, murder/manslaughter, the sale or possession for sale, transportation of controlled substances, and/or the sale, delivery, or transfer of firearms.” “In order to qualify as a primary activity, the crime must be one of the group’s chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group.”

“In *People v. Gardeley* . . . [(1996)] 14 Cal.4th 605,[611, 620,] th[e] requirement [of establishing one or more primary activities] was satisfied by the testimony of a police gang expert who expressed his opinion that the primary activities of the group in question were drug dealing and witness intimidation, both statutorily listed crimes. [Citation.]

. . . [¶] . . . [¶] Evidence of past or present (i.e., acts committed at the time of the charged offenses,) conduct by gang members involving the commission of one of more of the statutorily enumerated crimes is relevant in determining the group’s primary activities. . . . [¶] . . . Would such evidence alone be sufficient to prove the group’s primary activities? Not necessarily. The phrase ‘primary activities’ . . . would necessarily exclude the *occasional commission of those crimes by the group’s members*. . . . [¶] Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, some italics added.)

The prosecution’s gang expert did not testify that in his opinion, the Vagos’ primary activity consisted of the crimes listed in the jury instructions.

Of all the above-described activity ascribed to Vagos members, only the following fit within the crimes listed for the jury that occurred *before or at the time of the charged offenses*: the present murder and the beating administered to the victim before he died, the 20 incidents of sales of controlled substances and/or firearms between 2000 and 2002 at the Nomad chapter, the 2000 murder/manslaughter convictions of two members, the 1998 aggravated assault convictions of three members and a 1997 robbery conviction of a member. When compared with the only statistic offered at trial as to the membership of the Vagos, which was that in 2003, it had 300-400 members, these crimes cannot be said to constitute *consistent and repeated commission* of the listed offenses. Unlike most gang cases, where the membership is far more limited and it is therefore much easier to prove a primary activity, here, where there were hundreds of members, the prosecutor's task was much more difficult and he did not succeed. Perhaps if he had confined himself to the San Bernardino chapter and not presented evidence of crimes committed by members of other chapters, he might have been successful, but he did not choose this path.

Putting aside each crime or conviction that occurred after the charged crimes which the People assert as a basis for a finding of substantial evidence, we now address the evidentiary points raised by the People.

While knocking someone out with one punch alone, which, according to the expert, was rewarded with a patch, may, under certain circumstances, constitute an assault with intent to commit great bodily injury, without any testimony as to how many Vagos members had such a patch, there is no basis upon which to even add this fact to

the equation in determining the group's primary activity. The same is true for patches "celebrating" the wearer's former or current use or sale of marijuana or methamphetamine—aside from the fact that neither qualifies as a listed offense. Carrying drugs or guns and using methamphetamine also does not qualify. The People add that the fact that one member cleaned and took apart a gun that another member used to pistol whip the victim, along with the foregoing, could allow the jury to conclude from the prevalence of guns and methamphetamine that the sale/possession for sale/transportation of controlled substances and the sale/delivery/transfer of firearms was one of the primary activities of the club. However, given the large membership, it is not. The People's second assertion, that "the prevalence of firearms facilitated the Vagos' commission of . . . murder, manslaughter, and robbery" is unsupported by the evidence.

All the evidence about the group's code of silence, loyalty to each other, fear of retaliation for testifying and the bylaws have nothing whatsoever to do with the commission of the enumerated offenses. Beatings by members upon other members for disobedience or lack of respect was neither a listed offense, nor, considering that they were consented-to, any offense at all.

2. Credits

The parties agree that the trial court incorrectly calculated defendant's actual time in presentence custody as 960 days rather than the 1,325 days he served. We will direct the trial court to amend the minutes of the sentencing hearing and the abstract of judgment to show an award of 1,325 days of credit.

DISPOSITION

The true findings under sections 186.22, subdivision (b) and 12022.53, subdivisions (b), (c), (d) and (e)(1) are reversed, as are any sentences imposed for them, leaving a total sentence of 25 years to life. The trial court is directed to amend the abstracts of judgment and minutes of the sentencing hearing to reflect this, along with an award of 1,325 days of credit for defendant's actual presentence custody of 1,325 days. In all other respects, the judgment is affirmed.

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RAMIREZ

P. J.

We concur:

KING

J.

CODRINGTON

J.